

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

6	SHEILA WRIGHT,	)	
7	Plaintiff,	)	No. CV-09-164-CI
8	v.	)	
9	MICHAEL J. ASTRUE,	)	ORDER GRANTING PLAINTIFF'S
10	Commissioner of Social	)	MOTION FOR SUMMARY JUDGMENT
11	Security,	)	AND REMANDING FOR ADDITIONAL
	Defendant.	)	PROCEEDINGS PURSUANT TO
		)	SENTENCE FOUR 42 U.S.C. §
		)	405(g)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 11.) Attorney Gary R. Penar represents Plaintiff; Special Assistant United States Attorney David J. Burdett represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff Sheila Wright (Plaintiff) protectively filed for supplemental security income (SSI) and for disability income benefits (DIB) on November 16, 2005. (Tr. 71, 74, 706.) Plaintiff's SSI application alleged an onset date of November 2, 2005, and her DIB application alleged an onset date of October 21, 2005. (Tr. 71, 706.) Benefits were denied initially and on reconsideration. (Tr. 34, 38.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Hayward C. Reed on December 13, 2007. (Tr. 719-54.) Plaintiff was represented by counsel and testified at

1 the hearing. (Tr. 721-37, 739-40, 750-53.) Vocational expert Deborah  
2 Lapoint also testified. (Tr. 738-750.) The ALJ denied benefits (Tr.  
3 11-18) and the Appeals Council denied review. (Tr. 4.) The instant  
4 matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 5 **STATEMENT OF FACTS**

6 The facts of the case are set forth in the administrative hearing  
7 transcripts and will, therefore, only be summarized here.

8 Plaintiff was born on May 27, 1960 (Tr. 721) and was 47 years old  
9 at the time of the hearing. Plaintiff completed the ninth grade, but  
10 later obtained a GED and a one-year certificate in accounting. (Tr.  
11 637, 721-22.) She has worked as a motel maid, a sales attendant at a  
12 thrift store, and a telephone survey worker. (Tr. 723, 738-40.)  
13 Plaintiff testified that she feels unable to work because she has a  
14 hard time working for more than four hours and she gets really tired  
15 during long telephone surveys. (Tr. 724.) She said she has chronic  
16 obstructive pulmonary disease (COPD), fibromyalgia, restless leg  
17 syndrome, neuropathy, urinary incontinence, and sleep apnea. (Tr.  
18 724-25, 727, 729-30.) She is in pain all the time and gets fatigued  
19 during the day. (Tr. 726, 731-32.) She takes pain medication. (Tr.  
20 725, 734.) The pain is mostly in her back and her hands get crampy.  
21 (Tr. 726.) She gets out of breath easily and has pain down the back  
22 of her legs. (Tr. 726-27.) Plaintiff also testified she has a  
23 psychological condition. (Tr. 728.)

#### 24 **STANDARD OF REVIEW**

25 Congress has provided a limited scope of judicial review of a  
26 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the  
27 Commissioner's decision, made through an ALJ, when the determination  
28 is not based on legal error and is supported by substantial evidence.

1 See *Jones v. Heckler*, 760 F. 2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v.*  
2 *Apfel*, 180 F. 3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's]  
3 determination that a plaintiff is not disabled will be upheld if the  
4 findings of fact are supported by substantial evidence." *Delgado v.*  
5 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)).  
6 Substantial evidence is more than a mere scintilla, *Sorenson v.*  
7 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup> Cir. 1975), but less than a  
8 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir.  
9 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
10 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence  
11 as a reasonable mind might accept as adequate to support a  
12 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
13 (citations omitted). "[S]uch inferences and conclusions as the  
14 [Commissioner] may reasonably draw from the evidence" will also be  
15 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
16 review, the court considers the record as a whole, not just the  
17 evidence supporting the decision of the Commissioner. *Weetman v.*  
18 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*,  
19 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

20 It is the role of the trier of fact, not this court, to resolve  
21 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
22 supports more than one rational interpretation, the court may not  
23 substitute its judgment for that of the Commissioner. *Tackett*, 180  
24 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
25 Nevertheless, a decision supported by substantial evidence will still  
26 be set aside if the proper legal standards were not applied in  
27 weighing the evidence and making the decision. *Browner v. Sec'y of*  
28 *Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). Thus,

1 if there is substantial evidence to support the administrative  
2 findings, or if there is conflicting evidence that will support a  
3 finding of either disability or nondisability, the finding of the  
4 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
5 1230 (9<sup>th</sup> Cir. 1987).

#### 6 SEQUENTIAL PROCESS

7 The Social Security Act (the "Act") defines "disability" as the  
8 "inability to engage in any substantial gainful activity by reason of  
9 any medically determinable physical or mental impairment which can be  
10 expected to result in death or which has lasted or can be expected to  
11 last for a continuous period of not less than twelve months." 42  
12 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that  
13 a Plaintiff shall be determined to be under a disability only if his  
14 impairments are of such severity that Plaintiff is not only unable to  
15 do his previous work but cannot, considering Plaintiff's age,  
16 education and work experiences, engage in any other substantial  
17 gainful work which exists in the national economy. 42 U.S.C. §§  
18 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability  
19 consists of both medical and vocational components. *Edlund v.*  
20 *Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

21 The Commissioner has established a five-step sequential  
22 evaluation process for determining whether a claimant is disabled. 20  
23 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is  
24 engaged in substantial gainful activities. If the claimant is engaged  
25 in substantial gainful activities, benefits are denied. 20 C.F.R. §§  
26 404.1520(a)(4)(I), 416.920(a)(4)(I).

27 If the claimant is not engaged in substantial gainful activities,  
28 the decision maker proceeds to step two and determines whether the

1 claimant has a medically severe impairment or combination of  
2 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If  
3 the claimant does not have a severe impairment or combination of  
4 impairments, the disability claim is denied.

5 If the impairment is severe, the evaluation proceeds to the third  
6 step, which compares the claimant's impairment with a number of listed  
7 impairments acknowledged by the Commissioner to be so severe as to  
8 preclude substantial gainful activity. 20 C.F.R. §§  
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.  
10 1. If the impairment meets or equals one of the listed impairments,  
11 the claimant is conclusively presumed to be disabled.

12 If the impairment is not one conclusively presumed to be  
13 disabling, the evaluation proceeds to the fourth step, which  
14 determines whether the impairment prevents the claimant from  
15 performing work he or she has performed in the past. If plaintiff is  
16 able to perform his or her previous work, the claimant is not  
17 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
18 this step, the claimant's residual functional capacity ("RFC")  
19 assessment is considered.

20 If the claimant cannot perform this work, the fifth and final  
21 step in the process determines whether the claimant is able to perform  
22 other work in the national economy in view of his or her residual  
23 functional capacity and age, education and past work experience. 20  
24 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482  
25 U.S. 137 (1987).

26 The initial burden of proof rests upon the claimant to establish  
27 a *prima facie* case of entitlement to disability benefits. *Rhinehart*  
28 *v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d

1 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once the  
2 claimant establishes that a physical or mental impairment prevents him  
3 from engaging in his or her previous occupation. The burden then  
4 shifts, at step five, to the Commissioner to show that (1) the  
5 claimant can perform other substantial gainful activity, and (2) a  
6 "significant number of jobs exist in the national economy" which the  
7 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir.  
8 1984).

9 A finding of "disabled" does not automatically qualify a claimant  
10 for disability benefits. *Bustamante v. Massanari*, 262 F.3d 949, 954  
11 (9<sup>th</sup> Cir. 2001). When there is medical evidence of drug or alcohol  
12 addiction, the ALJ must determine whether the drug or alcohol  
13 addiction is a material factor contributing to the disability. 20  
14 C.F.R. §§ 404.1535(a), 416.935(a). It is the claimant's burden to  
15 prove substance addiction is not a contributing factor material to her  
16 disability. *Parra v. Astrue*, 481 F.3d 742, 748 (9<sup>th</sup> Cir. 2007).

17 If drug or alcohol addiction is a material factor contributing to  
18 the disability, the ALJ must evaluate which of the current physical  
19 and mental limitations would remain if the claimant stopped using  
20 drugs or alcohol, then determine whether any or all of the remaining  
21 limitations would be disabling. 20 C.F.R. §§ 404.1535(b)(2),  
22 416.935(b)(2).

#### 23 **ALJ'S FINDINGS**

24 At step one of the sequential evaluation process, the ALJ found  
25 Plaintiff has not engaged in substantial gainful activity since  
26 October 21, 2005, the alleged onset date. (Tr. 13.) At step two, he  
27 found Plaintiff has the following severe impairments: lung cancer in  
28 remission, sleep apnea, chronic obstructive pulmonary disease,

1 fibromyalgia, urinary incontinence, and posttraumatic stress disorder.  
2 (Tr. 13.) At step three, the ALJ concluded Plaintiff does not have an  
3 impairment or combination of impairments that meets or medically  
4 equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P,  
5 App. 1. (Tr. 14.) Next, the ALJ determined, "claimant has the  
6 residual functional capacity to perform light work as defined in 20  
7 CFR 404.1567(b) and 416.967(b) except she needs to avoid concentrated  
8 exposure to fumes, odors, dust, gases, and hazards." (Tr. 15.) At  
9 step four, the ALJ found Plaintiff is capable of performing past  
10 relevant work as a survey worker, sales attendant, and house cleaner.  
11 (Tr. 18.) Thus, the ALJ concluded Plaintiff has not been not been  
12 under a disability, as defined in the Social Security Act, from  
13 October 21, 2005, through the date of the decision. (Tr. 18.)

#### 14 ISSUES

15 The question is whether the ALJ's decision is supported by  
16 substantial evidence and free of legal error. Specifically, Plaintiff  
17 argues the ALJ erred by: (1) rejecting Plaintiff's testimony without  
18 clear and convincing reasons; (2) improperly rejecting a psychological  
19 opinion evidence; (3) failing to properly formulate the RFC; and (4)  
20 finding plaintiff capable of performing past relevant work. (Ct. Rec.  
21 10 at 25-39.) Defendant argues the ALJ: (1) properly determined  
22 Plaintiff was not entirely credible; (2) adequately addressed the  
23 medical evidence; (3) properly relied upon the vocational expert's  
24 testimony. (Ct. Rec. 12 at 5-10.)

#### 25 DISCUSSION

##### 26 1. Credibility

27 Plaintiff argues the ALJ's rationale for rejecting Plaintiff's  
28 credibility is legally deficient. (Ct. Rec. 10 at 25.) In social

1 security proceedings, the claimant must prove the existence of a  
2 physical or mental impairment by providing medical evidence consisting  
3 of signs, symptoms, and laboratory findings; the claimant's own  
4 statement of symptoms alone will not suffice. 20 C.F.R. § 416.908.  
5 The effects of all symptoms must be evaluated on the basis of a  
6 medically determinable impairment which can be shown to be the cause  
7 of the symptoms. 20 C.F.R. § 4416.929.

8       Once medical evidence of an underlying impairment has been shown,  
9 medical findings are not required to support the alleged severity of  
10 the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991).  
11 If there is evidence of a medically determinable impairment likely to  
12 cause an alleged symptom and there is no evidence of malingering, the  
13 ALJ must provide specific and cogent reasons for rejecting a  
14 claimant's subjective complaints. *Id.* at 346. The ALJ may not  
15 discredit pain testimony merely because a claimant's reported degree  
16 of pain is unsupported by objective medical findings. *Fair v. Bowen*,  
17 885 F.2d 597, 601 (9<sup>th</sup> Cir. 1989). The following factors may also be  
18 considered: (1) the claimant's reputation for truthfulness; (2)  
19 inconsistencies in the claimant's testimony or between his testimony  
20 and his conduct; (3) claimant's daily living activities; (4)  
21 claimant's work record; and (5) testimony from physicians or third  
22 parties concerning the nature, severity, and effect of claimant's  
23 condition. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9<sup>th</sup> Cir. 2002).

24       If the ALJ finds that the claimant's testimony as to the severity  
25 of her pain and impairments is unreliable, the ALJ must make a  
26 credibility determination with findings sufficiently specific to  
27 permit the court to conclude that the ALJ did not arbitrarily  
28 discredit claimant's testimony. *Morgan v. Apfel*, 169 F.3d 599, 601-02



1 (9<sup>th</sup> Cir. 1999). In the absence of affirmative evidence of  
2 malinger, the ALJ's reasons must be "clear and convincing."  
3 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007);  
4 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan*, 169  
5 F.3d at 599. The ALJ "must specifically identify the testimony she or  
6 he finds not to be credible and must explain what evidence undermines  
7 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9<sup>th</sup> Cir.  
8 2001)(citation omitted).

9 The ALJ concluded that Plaintiff's medically determinable  
10 impairments could reasonably expected to produce the symptoms alleged  
11 by Plaintiff, but the Plaintiff's statements concerning the intensity,  
12 persistence and limiting effects of her statements are not credible to  
13 the extent they are inconsistent with the residual functional capacity  
14 assessment. (Tr. 16.) The ALJ further found Plaintiff's statements  
15 are not credible and her statements concerning her pain, symptoms and  
16 limitations are not persuasive. (Tr. 17.) The ALJ cited a number of  
17 reasons to justify the credibility finding. (Tr. 16-17.)

18 First, the ALJ found there are inconsistencies between  
19 Plaintiff's statements and the objective medical evidence. (Tr. 16.)  
20 In support, the ALJ cites Plaintiff's statement that she had stopped  
21 drinking as inconsistent with a July 2006 medical note that Plaintiff  
22 fell and cut her eyebrow after drinking with friends. (Tr. 16, 509,  
23 662.) However, as Plaintiff points out, Plaintiff stated that she  
24 stopped drinking in March 2008, nearly two years after the note that  
25 she had fallen after consuming two alcoholic drinks. (Tr. 509.) This  
26 is not evidence of inconsistency in Plaintiff's reporting, and neither  
27 the ALJ nor Defendant cites any other evidence suggesting Plaintiff's  
28 March 2008 statement that she had stopped drinking was inaccurate.

1 Thus, the ALJ's conclusion that Plaintiff made inconsistent statements  
2 about drinking is not supported by the evidence.

3 Another inconsistency mentioned by the ALJ is that Plaintiff told  
4 her physical therapist she often had pain rated at 10 out of 10, yet  
5 she moved easily during her exam without apparent discomfort or pain.

6 (Tr. 16.) However, Plaintiff actually reported to the physical  
7 therapist that her pain ranged from 8-10 out of 10, and on that  
8 particular day she had taken a pain pill which reduced pain to 7 out  
9 of 10.<sup>1</sup> (Tr. 484.) The physical therapist did not suggest Plaintiff  
10 was malingering or exaggerating her pain, but identified limitations  
11 on lifting, carrying and reaching and set forth a treatment plan.  
12 (Tr. 484-85.) The ALJ's conclusion that Plaintiff is exaggerating her  
13 pain is based on a factual inaccuracy, and is therefore not a proper  
14 basis for the credibility finding.

15 Additionally, the ALJ cited Plaintiff's testimony that she can  
16 only walk two blocks, but she told the physical therapist and Dr.  
17 Gilbert that she "walks everywhere." (Tr. 16, 484, 701, 727.)  
18 Indeed, she told the physical therapist that she "walks everywhere and  
19 has never had any problems with doing that but she is beginning to  
20 have some discomfort during walking." (Tr. 484.) She told Dr.  
21 Gilbert she "walks everywhere" because she does not have a car. (Tr.  
22 701.) However, consistent with those reports, Plaintiff testified, "I  
23 walk everywhere, so I just - I walk a few blocks and I kind of stop  
24 and then I walk on because I have to walk everywhere." (Tr. 727.) The  
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26 <sup>1</sup>Plaintiff also testified that she had taken pain medication at  
27 the time of the May 11, 2007, physical therapy appointment. (Tr.  
28 737.)

1 ALJ's conclusion that Plaintiff's statements to her medical providers  
2 was inconsistent with her testimony is not supported by the evidence.  
3 In fact, none of the facts mentioned by the ALJ in support of the  
4 conclusion that Plaintiff made inconsistent statements is supported by  
5 the record. Therefore, the first reason given by the ALJ to justify  
6 the credibility finding is not supported by substantial evidence.

7 The ALJ also cited evidence that Plaintiff exaggerates her pain.  
8 (Tr. 16.) The ALJ pointed to an office visit note from ARNP Margaret  
9 Collyer which indicated that Plaintiff's pain complaints were out of  
10 proportion to the evidence. (Tr. 16, 589.) Ms. Collyer's notes state  
11 that Plaintiff's symptoms of degenerative arthritis or osteoarthritis  
12 "are certainly disproportionate to the x-rays and clinical findings,  
13 but she does have some degenerative arthritis." (Tr. 589.) The ALJ  
14 may not discredit pain testimony merely because a claimant's reported  
15 degree of pain is unsupported by objective medical findings. *Fair*,  
16 885 F.2d at 601. Ms. Collyer noted an objective basis for Plaintiff's  
17 pain, but opined that the degree of pain reported exceeded the  
18 objective medical findings. The ALJ's use of this opinion to support  
19 a negative credibility finding is contrary to the *Fair* case, *supra*.  
20 Therefore, the note by Ms. Collyer does not constitute a clear and  
21 convincing reason justifying the negative credibility finding.

22 The ALJ also listed several other reasons for rejecting  
23 Plaintiff's pain complaints. Defendant does not address Plaintiff's  
24 challenges to these additional reasons, and these reasons are not  
25 clear and convincing reasons supported by substantial evidence. The  
26 ALJ cited Plaintiff's work activity after the alleged onset date as  
27 suggestive that her daily activities have been somewhat greater than  
28 generally reported. (Tr. 16.) Part-time work is not inconsistent

1 with allegations of disability and does not constitute substantial  
2 evidence justifying a negative credibility finding. See *Carmickle v.*  
3 *Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9<sup>th</sup> Cir. 2008). "The  
4 Social Security Act does not require that claimants be utterly  
5 incapacitated to qualify for benefits." *Fair*, 885 F.2d at 603. The  
6 ALJ improperly considered Plaintiff's non-substantial gainful activity  
7 as a daily activity inconsistent with disability in making the  
8 credibility determination.

9 Another consideration cited by the ALJ is Plaintiff's lack of  
10 mental health treatment. (Tr. 16.) The ALJ stated, "If the claimant's  
11 mental health problems were not severe enough to motivate her to seek  
12 treatment, it is difficult to accept her assertion that they are  
13 disabling." (Tr. 16.) As Plaintiff points out, the Ninth Circuit has  
14 observed that depression "is one of the most under-reported illnesses  
15 in the country because those afflicted often do not recognize that  
16 their condition reflects a potentially serious mental illness."  
17 *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9<sup>th</sup> Cir. 1996). Although  
18 Plaintiff may have failed to seek psychiatric treatment for her mental  
19 condition, "it is a questionable practice to chastise one with a  
20 mental impairment for the exercise of poor judgment in seeking  
21 rehabilitation." *Id.*, quoting *Blankenship v. Bowen*, 874 F.2d 1116,  
22 1124 (6<sup>th</sup> Cir. 1989). It was not appropriate to consider Plaintiff's  
23 limited mental health treatment as evidence of a lack of a  
24 credibility.

25 Lastly, the ALJ also asserted the opinions of Plaintiff's  
26 treating sources undermine her credibility. (Tr. 17.) The ALJ  
27 observed that despite Plaintiff's symptoms, none of her treating  
28 providers ruled out performance of all work activity. (Tr. 16-17.)

1 In December 2005, Dr. Nisco opined that Plaintiff could perform  
2 sedentary work, although she was moderately limited with respect to  
3 lifting. (Tr. 471.) In June 2006, Sherry Franks, PA-C, indicated  
4 Plaintiff was limited to sedentary work, but noted the need for  
5 restrictions on pulling, pushing, sitting and climbing due to  
6 breathing issues and chronic body pain. (Tr. 477.) She also  
7 indicated that fibromyalgia limits Plaintiff's sitting, standing and  
8 walking capabilities. (Tr. 476.) According to Ms. Franks, in May  
9 2007, Plaintiff was capable of light work, with moderate interference  
10 in the ability to sit, stand, walk, lift and communicate due to her  
11 medical problems. (Tr. 481.)

12 While the ALJ is correct that none of the treating sources stated  
13 Plaintiff could not work, the vocational expert indicated that with  
14 the limitations assessed by Ms. Franks in June 2006, Plaintiff could  
15 not return to past work. (Tr. 746.) Similarly, the vocational expert  
16 indicated that with the limitations assessed by Dr. Nisco, an  
17 individual could perform only Plaintiff's past work as a survey  
18 worker, which the ALJ concluded was not substantial gainful activity  
19 and is therefore not past relevant work.<sup>2</sup> (Tr. 13, 745.) Thus, the  
20 record does not establish that the opinions of Dr. Nisco and Ms.  
21 Franks in fact mean that Plaintiff can work, if the limitations  
22 assessed by those treating providers are taken into account. As a  
23 result, the opinions are not necessarily inconsistent with Plaintiff's  
24 assertion of that she cannot work at a level consistent with  
25 substantial gainful activity.

26 The ALJ's justifications for the negative credibility  
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28 <sup>2</sup>The ALJ's past relevant work determination is discussed *infra*.

determination are neither clear and convincing nor supported by substantial evidence. As a result, the ALJ erred.

**2. Dr. Islam-Zwart**

Plaintiff asserts the ALJ improperly rejected the opinion of Dr. Islam-Zwart, an examining psychologist. (Ct. Rec. 10 at 29-32.) Dr. Islam-Zwart prepared a report dated March 18, 2008, and completed a DSHS psychological/psychiatric evaluation form. (Tr. 657-64.) Dr. Islam-Zwart diagnosed posttraumatic stress disorder, undifferentiated somatoform disorder, rule out somatization disorder, and rule out cognitive disorder not otherwise specified. (Tr. 664.) Dr. Islam-Zwart assessed a GAF of 50.<sup>3</sup> Dr. Islam-Zwart assessed five marked limitations and three moderate limitations and opined that Plaintiff is "clearly unable to work and it seems likely she will be unable to initiate and maintain regular employment in the near future." (Tr. 664.) The ALJ gave Dr. Islam-Zwart's opinion little weight. (Tr. 17.)

In disability proceedings, a treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific"

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<sup>3</sup>A GAF score of 41-50 indicates serious symptoms or any serious impairment in social, occupation, or school functioning. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4<sup>TH</sup> Ed. at 32.

1 and "legitimate" reasons that are supported by substantial evidence in  
2 the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995).  
3 Historically, the courts have recognized conflicting medical evidence,  
4 the absence of regular medical treatment during the alleged period of  
5 disability, and the lack of medical support for doctors' reports based  
6 substantially on a claimant's subjective complaints of pain as  
7 specific, legitimate reasons for disregarding a treating or examining  
8 physician's opinion. *Flaten v. Secretary of Health and Human Servs.*,  
9 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*, 885 F.2d at 604.

10 Dr. Islam-Zwart's opinion is not directly contradicted by any  
11 opinion created after the alleged date of onset, although a 2003  
12 opinion from Dr. Everhart relevant to a prior application indicates  
13 Plaintiff suffers from less severe limitations. (Tr. 363-64.) A  
14 January 2008 psychological evaluation report prepared by Dr. Gilbert  
15 does not contradict Dr. Islam-Zwart's findings and conclusions,  
16 although the diagnoses differ except for PTSD.<sup>4</sup> (Tr. 699-702.) Dr.  
17 Gilbert did not assess Plaintiff's work-related limitations, although  
18 he did assess a higher GAF score than Dr. Islam-Zwart. The court  
19 need not determine whether Dr. Islam-Zwart's opinion was contradicted  
20 because the ALJ's reasons for rejecting Dr. Islam-Zwart's opinion are

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22 <sup>4</sup>Dr. Gilbert diagnosed pain disorder associated with both  
23 psychological factors and a general medical condition, posttraumatic  
24 stress disorder, cannabis abuse and rule out borderline personality  
25 disorder. (Tr. 702.) Dr. Islam-Zwart diagnosed posttraumatic stress  
26 disorder, undifferentiated somatoform disorder, rule out somatization  
27 disorder, and rule out cognitive disorder not otherwise specified.  
28 (Tr. 664.)

1 neither specific and legitimate nor clear and convincing.

2 Two reasons were given for rejecting Dr. Islam-Zwart's opinion.  
3 First, the ALJ indicated that Dr. Islam-Zwart examined Plaintiff only  
4 once. (Tr. 17.) This is not a specific, legitimate reason for  
5 rejecting DSHS medical reports. The opinions of examining physicians  
6 must be considered by the ALJ. See 20 C.F.R. § 404.1527; *Lester v.*  
7 *Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). By definition, an examining  
8 physician does not have an ongoing relationship with a claimant; yet  
9 the regulations and case law require consideration and appropriate  
10 weighting of examining physician opinions. *Id.* The ALJ's suggestion  
11 that Dr. Islam-Zwart's report is inadequate because it is the result  
12 of a one-time examination leads to the conclusion that the opinions of  
13 all examining physicians or psychologists should be discarded,  
14 contrary to controlling authority. Thus, the fact that Dr. Islam-  
15 Zwart's opinion is based on a one-time exam is not a valid reason for  
16 rejecting the opinion.

17 The second reason mentioned by the ALJ in rejecting Dr. Islam-  
18 Zwart's opinion is that "her assessment is inconsistent with the rest  
19 of the medical evidence that shows the claimant has held down a job  
20 for over 8 years and she has not required mental health counseling."  
21 (Tr. 17.) The ALJ's reliance on Plaintiff's non-substantial gainful  
22 activity, part-time position as the basis for rejecting Dr. Islam-  
23 Zwart's opinion is misplaced. Dr. Islam-Zwart noted Plaintiff's part-  
24 time employment and opined plaintiff would not be able to "initiate  
25 and maintain regular employment." (Tr. 664.) The fact that Plaintiff  
26 worked part-time does not show she is physically or mentally able to  
27 work a full-time job. Furthermore, as discussed above, "The fact that  
28 claimant may be one of millions of people who did not seek treatment



1 for a mental disorder until late in the day is not a substantial basis  
2 on which to conclude that [a psychologist's] assessment of claimant's  
3 condition is inaccurate." *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9<sup>th</sup>  
4 Cir. 1996). Plaintiff's lack of mental health treatment does not bear  
5 on the validity of the conditions and limitations assessed by Dr.  
6 Islam-Zwart. This is not a specific, legitimate reason supported by  
7 substantial evidence for rejecting the opinion.

8 Defendant asserts the ALJ rejected also Dr. Islam-Zwart's opinion  
9 because "it was predicated in part on the subjective testimony of a  
10 patient who lied to Dr. Islam-Zwart at least once." (Ct. Rec. 12 at  
11 8.) Notwithstanding the fact that the ALJ did not cite this reason  
12 for rejecting the opinion, and assuming Defendant references the  
13 allegedly inconsistent statements about drinking, the record does not  
14 support this argument.

15 The ALJ did not cite sufficient specific, legitimate reasons  
16 supported by substantial evidence or clear and convincing reasons  
17 supported by substantial evidence to justify rejection of Dr. Islam-  
18 Zwart's report. As a result, the ALJ erred in rejecting Dr. Islam-  
19 Zwart's opinion.

### 20 **3. RFC**

21 Plaintiff argues the residual functional capacity determination  
22 is inadequate for several reasons. (Ct. Rec. 10 at 32-36.) The ALJ  
23 must examine a claimant's residual functional capacity and the  
24 physical and mental demands of the claimant's past relevant work at  
25 step four of the sequential process. 20 C.F.R. § 404.1520(e). RFC is  
26 what an individual can still do despite his or her limitations.  
27 S.S.R. 96-8p. Regulations require the ALJ to undertake a "function-  
28 by-function" analysis of the claimant's capacity to work according to

1 exertional categories. The RFC assessment must first identify the  
2 individual's functional limitations or restrictions and assess his or  
3 her work-related abilities on a function-by-function basis, including  
4 the functions in paragraphs (b), (c), and (d) of 20 C.F.R. §§ 404.1545  
5 and 416.945.

6 Plaintiff assigns a number of errors to the ALJ's RFC finding.  
7 Plaintiff argues the ALJ failed to accept or reject the opinions of  
8 Dr. Nisco, Ms. Franks and Dr. Gilbert. (Ct. Rec. 10 at 43.) The ALJ  
9 mentioned the opinions of Dr. Nisco and Ms. Franks in the credibility  
10 analysis but did not discuss the limitations assigned by those  
11 professionals or explain why he did not accept or reject those  
12 opinions. Both are treating practitioners, and the ALJ's failure to  
13 address their opinions constitutes error. See *Lester*, 81 F.3d at 830;  
14 20 C.F.R. § 404.1527(b); S.S.R. 96-8p. Defendant argues the error was  
15 harmless error<sup>5</sup> because their opinions were accommodated by the ALJ's  
16 residual functional capacity determination. (Ct. Rec. 12 at 9.) This  
17 is not correct, as the assessments of sedentary and light work by Dr.  
18 Nisco and Ms. Franks were qualified by additional limitations which  
19  
20

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21 <sup>5</sup>Harmless error only occurs if the error is inconsequential to the  
22 ultimate nondisability determination. See *Robbins v. Soc. Sec.*  
23 *Admin.*, 466 F.3d 880, 885 (9<sup>th</sup> Cir. 2006); *Stout v. Comm'r, Soc. Sec.*  
24 *Admin.*, 454 F.3d 1050, 1055-56 (9<sup>th</sup> Cir. 2006). Errors that do not  
25 affect the ultimate result are harmless. See *Parra v. Astrue*, 481  
26 F.3d 742, 747 (9<sup>th</sup> Cir. 2007); *Curry v. Sullivan*, 925 F.2d 1127, 1131  
27 (9<sup>th</sup> Cir. 1990); *Booz v. Sec'y of Health & Human Servs.*, 734 F.2d 1378,  
28 1380 (9<sup>th</sup> Cir. 1984).

1 were not considered by the ALJ.<sup>6</sup>

2 Dr. Gilbert, an examining psychologist, diagnosed pain disorder  
3 associated with both psychological factors and a general medical  
4 condition, posttraumatic stress disorder, cannabis abuse and rule out  
5 borderline personality disorder. (Tr. 702.) Although the ALJ  
6 acknowledged Dr. Gilbert's findings at step two, the ALJ did not  
7 accept or reject the opinion or otherwise discuss Dr. Gilbert's  
8 findings. As Plaintiff's brief suggests, it is possible that Dr.  
9 Gilbert's diagnosis of pain disorder may explain some portion of  
10 Plaintiff's complaints. (Ct. Rec. 10 at 26.) Defendant relies on the  
11 Dr. Gilbert's assessment of a GAF of 65<sup>7</sup> in suggesting that the ALJ's  
12 failure to consider Dr. Gilbert's opinion is harmless error. (Ct.  
13 Rec. 12 at 9-10.) However, the Commissioner has explicitly disavowed  
14 use of GAF scores as indicators of disability. "The GAF scale . . .  
15 does not have a direct correlation to the severity requirements in our  
16 mental disorder listing." 65 Fed. Reg. 50746-01, 50765 (August 21,

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17  
18 <sup>6</sup>This is significant to the ultimate determination of  
19 nondisability because, as discussed *supra*, the vocational expert's  
20 testimony establishes that no past relevant work could be performed by  
21 Plaintiff when Dr. Nisco's limitations and Ms. Franks June 2006  
22 limitations are taken into account.

23 <sup>7</sup>A GAF score of 61-70 indicates "some mild symptoms, (e.g.,  
24 depressed mood and mild insomnia) OR some difficulty in social,  
25 occupational, or school functioning (e.g., occasional truancy, or  
26 theft within the household), but generally functioning pretty well,  
27 has some meaningful interpersonal relationships." DIAGNOSTIC AND  
28 STATISTICAL MANUAL OF MENTAL DISORDERS, 4<sup>TH</sup> Ed. at 32.

1 2000). Thus, the GAF score is not a basis on which the court may  
2 conclude the ALJ's failure to address Dr. Gilbert's opinion is  
3 harmless error.

4 Plaintiff also complains the ALJ relied on the state consulting  
5 physician opinion for the contents of the RFC. (Ct. Rec. 10 at 35.)  
6 Dr. Staley's May 2006 residual functional capacity assessment  
7 indicates Plaintiff can occasionally lift or carry 20 pounds,  
8 frequently lift or carry 10 pounds, stand or walk about 6 hours in an  
9 8-hour day, and can sit 6 hours in an 8-hour day with unlimited  
10 push/pull ability. (Tr. 154.) Dr. Staley indicated Plaintiff should  
11 avoid concentrated exposure to fumes, odors, dusts, gases, poor  
12 ventilation and hazards. (Tr. 157.) Dr. Staley's opinion is  
13 consistent with the ALJ's RFC finding that Plaintiff can do light work  
14 but needs to avoid concentrated exposure to fumes, odors, dust, gases  
15 and hazards. (Tr. 15, 17.) However, Dr. Staley's opinion did not  
16 take into account nearly two years of additional medical evidence,  
17 including the information from and opinions of Ms. Franks and Ms.  
18 Collyer, physical therapy records, and other relevant medical  
19 evidence. Dr. Staley's opinion may be a reasonable basis for the RFC,  
20 but the ALJ must properly accept or reject the opinions of treating  
21 and examining physicians before relying on the opinion of a reviewing  
22 physician, and must cite other evidence supporting the consulting  
23 physician opinion. See *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at  
24 830-31. The ALJ failed to adequately justify his reliance on Dr.  
25 Staley's opinion.

26 Based on the foregoing, the ALJ's RFC determination is legally  
27 insufficient. "The RFC assessment must always consider and address  
28 medical source opinions. If the RFC assessment conflicts with an

1 opinion from a medical source, the adjudicator must explain why the  
2 opinion was not adopted." S.S.R. 96-8p. The ALJ erred by failing to  
3 fully discuss the medical source evidence and by adopting the opinion  
4 of a consulting physician without properly rejecting the opinions of  
5 treating and examining providers.

#### 6 **4. Past Relevant Work**

7 Plaintiff argues the ALJ improperly identified Plaintiff's past  
8 relevant work. (Ct. Rec. 10 at 37.) The ALJ inconsistently  
9 determined Plaintiff's survey work is past relevant work, despite  
10 previously finding that Plaintiff's part-time work as a survey worker  
11 is not substantial gainful activity because she does not earn enough.  
12 (Tr. 13, 18.) Furthermore, for past work as a housekeeper, Plaintiff  
13 earned less than the amount constituting substantial gainful activity  
14 under the regulations.<sup>8</sup> Thus, the ALJ erred in determining that  
15 Plaintiff has past relevant work as a housekeeper and as a survey  
16 worker. Additionally, the ALJ's failure to properly substantiate the  
17 findings regarding Plaintiff's credibility and properly consider of  
18 the medical evidence calls into question the validity of the remainder  
19

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20 <sup>8</sup>If average monthly earnings are less than the amount described  
21 in the regulations, it is presumed that a claimant has not engaged in  
22 substantial gainful activity. 20 C.F.R. §§ 404.1574(b)(3);  
23 404.974(b)(3). For 1996 and 1997, monthly earnings over \$500  
24 constitutes substantial gainful activity under the regulations. 20  
25 C.F.R. §§ 404.1574(b)(2), 416.974(b)(2). Plaintiff performed  
26 housekeeping work in 1996-97 for 16 hours per week at \$7.00 per hour,  
27 earning \$5,687 in 1996 and \$6,071 in 1997, an average of less than  
28 \$500 per month. (Tr. 60, 117.)

1 of the step four finding.

2 **5. Remedy**

3       There are two remedies where the ALJ fails to provide adequate  
4 reasons for rejecting the opinions of a treating or examining  
5 physician. The general rule, found in the *Lester* line of cases, is  
6 that "we credit that opinion as a matter of law." *Lester v. Chater*,  
7 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1996); *Pitzer v. Sullivan*, 908 F.2d 502, 506  
8 (9<sup>th</sup> Cir. 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989).  
9 Another approach is found in *McAllister v. Sullivan*, 888 F.2d 599 (9<sup>th</sup>  
10 Cir. 1989), which holds a court may remand to allow the ALJ to provide  
11 the requisite specific and legitimate reasons for disregarding the  
12 opinion. See also *Benecke v. Barnhart*, 379 F.3d 587, 594 (9<sup>th</sup> Cir.  
13 2004) (court has flexibility in crediting testimony if substantial  
14 questions remain as to claimant's credibility and other issues).  
15 Where evidence has been identified that may be a basis for a finding,  
16 but the findings are not articulated, remand is the proper  
17 disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9<sup>th</sup> Cir. 1990)  
18 (citing *McAllister*); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup>  
19 Cir. 1990).

20       After considering the record in this case as a whole, it is not  
21 clear that Plaintiff is disabled. The ALJ is in a better position  
22 than this court to evaluate the medical evidence and make a disability  
23 determination. See *McAllister* at 603. The ALJ must evaluate all of  
24 the medical opinion evidence, reevaluate Plaintiff's credibility,  
25 make a new RFC determination, and make new findings at step four  
26 before a finding of disability can be made. Remand is therefore the  
27 appropriate remedy. The opinion of a medical expert may be helpful on  
28 remand to ascertain the nature and extent of Plaintiff's limitations

1 to be included in the RFC assessment. The court expresses no opinion  
2 as to what the outcome on remand will or should be.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the court  
5 concludes the ALJ's decision is not supported by substantial evidence  
6 and is based on legal error. On remand, the ALJ should conduct a new  
7 sequential evaluation process, taking into account all of the medical  
8 and psychological opinion evidence and, if necessary, the opinion of  
9 a medical expert. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is  
12 **GRANTED**. The matter is remanded to the Commissioner for additional  
13 proceedings pursuant to sentence four 42 U.S.C. § 405(g).

14 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 11**) is  
15 **DENIED**.

16 3. An application for attorney fees may be filed by separate  
17 motion.

18 The District Court Executive is directed to file this Order and  
19 provide a copy to counsel for Plaintiff and Defendant. Judgment shall  
20 be entered for Plaintiff and the file shall be **CLOSED**.

21 DATED June 2, 2010.

22  
23 S/ CYNTHIA IMBROGNO  
24 UNITED STATES MAGISTRATE JUDGE  
25  
26  
27  
28